

DATE: April 18, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-12922

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esq., Department Counsel

#### **FOR APPLICANT**

Joseph T. Simon, Esq.

Applicant has appealed the December 17, 2002 decision of Administrative Judge John R. Erck, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 1, 2002. The SOR was based on Guideline B (Foreign Influence) and Guideline C (Foreign Preference). A hearing was held on September 12, 2002. The Administrative Judge subsequently issued a written decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse decision.

### **Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a

Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

### **Appeal Issue**

The Administrative Judge made findings of fact concerning: (a) Applicant's immigrating to the United States and becoming a naturalized United States citizen; (b) Applicant's marriage to an Iranian citizen in 1988; (c) Applicant's family ties with relatives in Iran; (d) Applicant's trips to Iran to visit his family there; and (d) Applicant's possession and use of an Iranian passport to facilitate his trips to Iran. The Judge's findings of fact have not been challenged on appeal.

On appeal, Applicant argues: (1) the only reasons alleged for denying or revoking his access to classified information pertain to Guideline B and Guideline C, not any of the eleven other Guidelines in the Directive; (2) the Adjudicative Guidelines disqualifying conditions use the word "may"; (3) the facts and circumstances of Applicant's possession and use of an Iranian passport mitigate any security concerns; (4) Applicant's possession and use of an Iranian passport are no different from the possession and use of an Italian passport, which was found in another DOHA case to be insufficient to warrant an adverse security clearance decision; and (5) Applicant would take whatever action is expected of him by the Department of Defense if he must return to Iran. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's arguments are not persuasive.

(1) The SOR issued to Applicant cited Guideline B (Foreign Influence) and Guideline C (Foreign Preference). It is legally irrelevant that the SOR issued to Applicant did not cite any of the eleven other Guidelines listed in the Directive. Nothing in Executive Order 10865 or the Directive indicates or suggests that an applicant must be granted a security clearance unless the applicant's conduct and circumstances fall under or implicates all thirteen Guidelines listed in the Directive. The mere fact that the SOR cited only Guideline B and Guideline C did not preclude the Administrative Judge from making an adverse security clearance decision based on an evaluation of Applicant's conduct and circumstances under those two Guidelines. As the Board has noted, "Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in." ISCR Case No. 99-0254 (February 16, 2000) at p. 3.

(2) Applicant correctly notes that the Adjudicative Guidelines disqualifying conditions use the following language "Conditions that could raise a security concern and may be disqualifying include . . . ." Although Applicant's brief draws the Board's attention to the word "may" by italicizing it, Applicant does not articulate any argument as to why the word "may" renders the Administrative Judge's decision arbitrary, capricious, or contrary to law. There is no presumption of error below, and the appealing party has the burden of raising claims of error with sufficient specificity to enable the nonappealing party and the Board to discern what error the appealing party is claiming the Judge committed. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing the reasons why an appealing party must raise claims of error with specificity). Because Applicant's argument on this point lacks specificity, the Board concludes it is legally insufficient to raise any colorable claim of error by the Judge.

(3) Applicant's argument concerning the facts and circumstances of his possession and use of an Iranian passport fails to demonstrate the Administrative Judge erred. There is no dispute on appeal that Applicant has possessed and used an Iranian passport in the past, and that at the time of the hearing, Applicant still possessed an Iranian passport. Accordingly, the Judge correctly concluded that Applicant's possession and use of an Iranian passport fall under the terms of the August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence ("ASDC3I memo") concerning adjudication of security clearance cases involving foreign passports. Under the terms of the ASDC3I memo, Applicant's continued possession of an Iranian passport precluded a favorable security clearance decision. To the extent that Applicant's brief seems to suggest that the Judge should have cleared Applicant despite his continued possession of an Iranian passport, Applicant's argument is unpersuasive. Neither the Judge nor this Board has the authority or discretion to ignore, disregard, or decline to apply the ASDC3I memo. [\(1\)](#)

(4) Applicant's reliance on a decision by a Hearing Office Administrative Judge in another DOHA case (ISCR Case No. 01-05211, December 14, 2001) is misplaced. A decision by a DOHA Hearing Office Judge is not legally binding precedent on another DOHA Hearing Office Judge in another case. Furthermore, just as the decisions of trial-level judges are not legally binding on appellate courts, the decisions of Hearing Office Judges are not legally binding precedent on the Board. At most, a party can cite such decisions as persuasive authority. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 4. Department Counsel correctly notes that the decision in ISCR Case No. 01-05211 is distinguishable on its facts from this case because Applicant still possesses an Iranian passport, whereas the applicant in ISCR Case No. 01-05211 no longer possessed an Italian passport. Whatever persuasive value that the Judge's decision in ISCR Case No. 01-05211 might have in a case with similar facts, it does not have persuasive value in this case.

(5) Applicant's statement of willingness to take action in the future if he returns to Iran does not demonstrate factual or legal error by the Administrative Judge. A promise to take remedial action in the future is not evidence of reform, rehabilitation, or changed circumstances that warrant a favorable security clearance decision. Furthermore, Applicant's statement at the hearing that he will allow his Iranian passport to expire and will not renew it does not take his case outside the scope of the ASDC3I memo. *See, e.g.*, ISCR Case No. 00-0009 (September 26, 2001) at p. 4.

### **Conclusion**

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 7.